No. 15598

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT VITA SCIAMA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdiction of the Court.

Appellee adopts the statement of the appellant concerning jurisdiction.

Statement of the Case.

Plaintiff is an alien, native of Egypt, a citizen of Italy and last entered the United States on January 26, 1956 at Tacoma, Washington, at which time he was admitted as a temporary visitor for six months.

The temporary visit of the plaintiff was last extended until September 15, 1947 and on November 30, 1947 plaintiff was notified that his application for a further extension of stay as a temporary visitor had been denied and that it was incumbent upon him to depart from the United States within two weeks of that date. Because of the introduction of a private bill in Congress the Immigration and Naturalization Service took no further action.

On October 1, 1948, Appellant filed application to adjust his immigration status under the Displaced Persons Act of 1948. He was accorded a hearing on that application at Los Angeles, California on October 24, 1949 and November 18, 1949; under date of November 22, 1949, the Examining Officer recommended that the application be denied because appellant at that time was not displaced either from the country of his birth, nationality or last residence and for the further reason that he could return to any of such countries at that time without fear of persecution. No action was taken on that decision.

Under date of April 30, 1954 the proceedings under Section 4 of the Displaced Persons' Act of 1948 were ordered reopened. A further examination was accorded appellant under that application relating to adjustment of status at Los Angeles, California on May 2, 1955. The application was denied on June 15, 1955 by the Regional Commissioner of the Southwest Region. The ground for said denial was that appellant had not entered the United States in 1946 as a temporary visitor.

Appellant was thereafter served with a Warrant of Arrest. A hearing in deportation was held on June 29, 1955, at which special inquiry officer was John D. Bartos. The appellant was held to be deportable under Sections 14 and 15 of the Nationality Act of 1924 [8 U. S. C. 214, 215 (1940 ed.)] in that he was an alien who at any time after entering the United States is found to have remained therein for a longer time than permitted under the statute and regulations. The Board of Immigration's Appeal dismissed an appeal on said order on January 31, 1956 and denied a Motion for Stay on March 30, 1956. On May 9, 1956 a Warrant of Deportation was issued.

The within action was filed on May 29, 1956 and was a Complaint for Judicial review and injunction. On March

25, 1956 trial was had before the Honorable Wm. M. Byrne, United States District Judge for the Southern District of California after which on May 2, 1957 said Honorable Wm. M. Byrne rendered decision in favor of defendant.

From said decision the within appeal was taken.

Issues Presented.

1. When appellant first entered the United States on January 26, 1946 at Tacoma, Washington had he "lawfully entered the United States as a non-immigrant" under Section 4 of the Displaced Persons Act of 1948 [50 App. U. S. C. A. 1953, 62 Stat. 1009]?

Although appellant does not raise the issue properly, appellant at page 4 of his opening brief as part of his assertions of fact attacks the validity of the deportation hearing as being held in contravention of "laws thereunto appertaining". The only law "thereunto appertaining" would be Section 11 of the Administrative Procedure Act [Act of June 11, 1946, 60 Stat. 244, 8 U. S. C. A. 1010]. Accordingly the following issue is deemed raised:

2. Whether the appointment, qualifications and assignment of special inquiry officers conducting deportation hearings are excepted from the requirements of Section 11 of the Administrative Procedure Act. [Act of June 11, 1946, 60 Stat. 244, 5 U. S. C. A. 1010]?

Statutes Involved.

Section 4 of the Displaced Persons Act of 1948, 62 Stat. 1009, 50 App. U. S. C. A. 1953, provides:

> "(a) Any alien who (1) entered the United States prior to April 30, 1949 and was on that date in the United States or if he was temporarily absent from

the United States on that date for reasons which in accordance with regulations to be promulgated by the Attorney General, shows special circumstances justifying such absence, and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section may, within two years next following the effective date of this Act, as amended, apply to the Attorney General for an adjustment of his immigration status . . .

"(b) When used in this section the term 'Displaced Person residing in the United States' means a person who establishes that he lawfully entered the United States as a non-immigrant under section 3 or as a non-quota immigrant student under subdivision (e) of Section 4 of the Immigration Act of May 26, 1924, as amended, and that he is a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II; and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions."

Section 3 of the Immigration Act of May 26, 1924, as amended, 8 U. S. C. A. 203, 43 Stat. 154 provides:

"When used in this chapter the term 'Immigrant' means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government recognized by the Government of the United States, . . . (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure . . ."

ARGUMENT.

I.

Appellant's Application for Adjustment of Status Under Section 4 of the Displaced Persons Act of 1948 [62 Stat. 1009, 50 App. U. S. C. A. 1953] Was Properly Denied Because Appellant Had Not "Lawfully Entered the United States as a Non-immigrant".

Appellant admits the following facts: That he entered the United States on January 1946 as a temporary visitor; that at that time it was his intention to remain in the United States permanently; he alleges that he entered as a visitor only becouse the American Consul in Shanghai did not have a supply of immigrant visas available and because he was advised he could obtain an immigrant visa at Tijuana, Baja California, Mexico.

The only evidence in the record that the American Consul in Shanghai made the above representations came from the bare assertions of the appellant and cannot be deemed established; however, the above facts will be assumed, for the purpose of argument.

A.

It is well settled that where an alien enters the United States as a temporary visitor and at the time of entry intends to remain permanently, his subjective intent governs and he is deemed not to have entered the United States lawfully.

Sleddens v. Shaughnessy (2 Cir. 1949), 177 F. 2d 363;

United States ex rel. Feretic v. Shaughnessy (2 Cir. 1955), 221 F. 2d 262;

In re Chow's Petition (S. D. N. Y. 1956), 146 Fed. Supp. 487;

Lukman v. Holland (E. D. Pa. 1957), 149 Fed. Supp. 312.

Section 4(b) of the Displaced Persons Act of 1948 (*supra*) requires that in order to qualify for adjustment of status under Section 4, the applicant must have "lawfully entered the United States as a non-immigrant under Section 3 of the Immigration Act of May 26, 1924".

Section 3 of the Immigration Act of May 26, 1924 (*supra*) provides that a non-immigrant is, among other things, "(2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

It is easily seen, then, that appellant having intended to remain permanently at the time of entry could not have entered lawfully as a "non-immigrant", as is required by Section 4(b) of the Displaced Persons Act of 1948 (*supra*).

In *Sleddens v. Shaughnessy* (*supra*) the Court made the following pertinent statement at page 364:

> "The relator first applied for an Immigration visa. He was told, in substance, that there was such an accumulation of applications for immigration visas that he could not obtain one inside of three or four years. He sought to come to America to establish a business of selling Dutch flower bulbs, Holland gin and other articles. He said that his intention when given a visitor's permit, was to remain in America permanently, if possible. He so

testified before the Immigration authorities. He brought his family with him and made no showing that he retained a domicile in Holland or had any intention of returning. Under these circumstances we think the finding that he came as an immigrant without a visa was justified."

In *United States ex rel. Feretic v. Shaughnessy* (*supra*), the court, in deciding a case under the very same statute in question here (Section 4 of the Displaced Persons Act of 1948), held that an alien seaman admitted as such, who, at the time of entry into the United States intended to remain permanently in the United States had not entered lawfully as a "bona fide non-immigrant". At page 264 the Court made the following statement:

"The last entry of relator into the United States prior to the filing of his 1949 Petition was on December 24, 1944, in the Port of San Pedro, California, as a member of the crew of the S.S. Caleroy, at which time he was admitted as a non-immigrant under the provisions of Section 3(5) of the Immigration Act of 1924. His papers were in order as a 'bona fide alien seaman' temporarily here and with the intention of departing at or before the expiration of his leave on the same or some other vessel. In reality, however, his own unequivocal testimony compelled the finding that when he left the ship he intended to stay here permanently, if he could. Under these circumstances, we have no doubt that his entry was illegal. In effect he perpetrated a fraud upon the immigration authorities when he induced them to let him off the ship on the basis of the usual papers presented by bona fide alien seaman; and he was not a 'bona fide non-immigrant'. No amount of sympathy for an alien who wishes to disassociate him-

self from a Communistic regime from the country of his birth can furnish justification or excuse for disregarding the plain mandate of the statute."

B.

Appellant also contends that because the Consular officials at Shanghai represented that appellant could obtain an immigrant visa "easily" at Tijuana, Mexico after arrival in the United States and because the Consul at Shanghai did not have a supply of proper immigration forms, that the appellant's otherwise unlawful entry is rendered lawful.

The law is to the contrary and well settled. The United States is neither bound nor estopped by the Act or arrangements of its officers or agents to do or cause to be done what the law does not sanction or permit.

Federal Crop Insurance Corporation v. Merrill, 323 U. S. 380 (1947);

United States v. Stewart, 311 U. S. 60, 70 (1940);

Wilbur National Bank v. United States, 294 U. S. 120, 123 (1935);

Utah Power and Light Company v. United States, 243 U. S. 389 (1917);

Whiteside v. United States, 93 U. S. 247 (1876); *Lee v. Munroe,* 7 Cranch (11 U. S. 366) (1813).

II.

The Appointment, Qualification and Assignment of Special Inquiry Officers of the Immigration and Naturalization Service Holding Deportation Hearings Are Excepted From the Requirement of the Provisions of Section 11, Administrative Procedures Act. [Act of June 11, 1946, 60 Stat. 244, 5 U. S. C. A. 1010.]

At page 4 of the Appellant's Opening Brief and the Statement of Facts, appellant alleges that the deportation hearing conducted by John D. Bartos, Special Inquiry Officer, of the Immigration and Naturalization Service, was invalid because in violation of "laws thereunto appertaining".

The appellant has raised the issue improperly and ambiguously. The law "thereunto appertaining" is Section 11 of the Administrative Procedure Act (*supra*). Once in doubt, it has since been resolved. The Courts now uniformly hold that Section 11 of the Administrative Procedure Act has no application to special inquiry officers of the Immigration and Naturalization Service who hold deportation hearings. The rationale of the decisions is that §7(a) of the Administrative Procedure Act [60 Stat. 241, 5 U. S. C. A. 1006(b)] excepts from its terms "officers specially provided for by or designated pursuant to statute".

Ocon v. Albert Del Guercio (9 Cir. 1956), 237 F. 2d 177, 179;

Couto v. Shaughnessy (2d Cir. 1955), 218 F. 2d 758, 759, cert. den. 349 U. S. 952, 75 S. Ct. 879, 99 L. Ed. 1276;

Marcello v. Ahrens (5th Cir.), 212 F. 2d 830, 836;

Tsiminois v. Holland (3d Cir.), 228 F. 2d 907, 908;

Marcello v. Bonds (1955), 349 U. S. 302, 305, 75 S. Ct. 757, 759, 99 L. Ed. 1107.

In *Marcello v. Bonds* (*supra*), the court stated at page 305:

> "Petitioner concedes that §242(b) of the Immigration Act, authorizing the appointment of a 'Special Inquiry Officer' to preside at the deportation proceedings, does not conflict with the Administrative Procedure Act, since §7(a) of that Act excepts from its terms officers specially provided for or designated pursuant to other statutes . . ."

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the decision of the District Court rendering judgment in favor of the Appellee, Albert Del Guercio, District Director of Immigration and Naturalization Service at Los Angeles, should be affirmed.

Respectfully submitted,

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